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Supreme Court, U.S.
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No. 04-316

In the Supreme Court of the United States

UNIONE MEDITERRANEA DI SICURTA, et al.,
Petitioners,

v.

STEVEN HENRY ARTHUR ADAMS, et al.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1). Did the United States Court of Appeals for the Fifth Circuit properly apply a nationwide contact analysis pursuant to Federal Rule of Civil Procedure 4(k)(2) in order to affirm the trial court's finding of *in personam* jurisdiction over a foreign marine insurer?

2). Does *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955) require a Fourteenth Amendment minimum contact analysis with the forum state when a federal district court is exercising admiralty jurisdiction over a foreign marine insurer who has been served with process pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6 the Respondents to this proceeding are as follows:

1. A.K. Steel Corporation (f/k/a Armco Steel Company, L.P.)

2. Certain Underwriters at Lloyd's;

3. Certain Insurance Companies, as follows:

    a. Indemnity Marine Assurance Company, Ltd.;

    b. The Yorkshire Insurance Company, Ltd.;

    c. Commercial Union Assurance Company, Plc;

    d. Phoenix Assurance, Plc;

    e. Cornhill Insurance Plc;

    f. Norwich Union Fire Insurance Society, Ltd.;

    g. Maritime Insurance Company, Ltd.;

    h. Northern Assurance Company, Ltd.;

    i. Skandia U.K. Insurance, Plc;

    J. Ocean Marine Insurance Company, Ltd.;

k. Folksam International Insurance Company (U.K.) Ltd.;

l. Scottish Lion Insurance Company, Ltd.;

m. Wurtemmbergische Feuerversicherung A.G.;

n. Sphere Drake Insurance, Plc;

o. Dai-Tokyo Insurance Company (U.K.), Ltd.

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STATEMENT OF THE CASE

The statement of the case framed by the applicant is seriously flawed. UMS erroneously contends that the United States Court of Appeals for the Fifth Circuit resorted to a jurisdictional analysis of the contacts of UMS with the United States as a whole because it was unable to affirm the District Court's exercise of personal jurisdiction over UMS under Louisiana's Long-Arm Statute. Writ App. pp. 2, 3. However, the Fifth Circuit actually held that the exercise of personal jurisdiction is "clearer and more straightforward under Rule 4(k)(2) than under Louisiana law."

Indeed, the Fifth Circuit did not even address the trial court's factual finding that it had jurisdiction over UMS based upon its contacts with the State of Louisiana. The Fifth Circuit simply and properly affirmed the District Court's jurisdictional ruling on the alternate basis that jurisdiction over UMS could be exercised pursuant to Federal Rule of Civil Procedure 4(k)(2). *Ibid.*

REASONS FOR DENYING THE PETITION

UMS HAS NOT IDENTIFIED ANY BASIS FOR THE EXERCISE OF DISCRETIONARY REVIEW BY THIS COURT

Careful scrutiny of the reasons advanced by UMS in support of its application demonstrates that there is no meaningful basis for this Court to exercise its discretionary jurisdiction over this matter. UMS has not cited to any real conflict with any decision from this Court or with a decision from any (other) Court of Appeal.

Additionally, UMS fails to identify any compelling issue that is of significance to anyone other than a particular class of defendants in maritime civil proceedings. This class of defendants consists entirely of foreign marine insurers with nationwide contacts in the United States who seek to avoid the exercise of personal jurisdiction by a United States District Court with subject matter jurisdiction sounding in admiralty. The singular result in granting a writ of certiorari to review the Fifth Circuit's decision will necessarily impact only upon this limited class of defendants.

I. THE DECISION OF THE FIFTH CIRCUIT IS NOT IN CONFLICT WITH ANY OTHER DECISION FROM ANOTHER CIRCUIT COURT OF APPEALS

UMS fails to identify any conflict with any other federal Court of Appeals on the same matter of federal law. Instead, UMS only quarrels with the Fifth Circuit's interpretation of its own prior decisions defining the application of Federal Rule of Civil Procedure 4(k)(2). These issues were fully considered and passed upon by the Fifth Circuit in its ruling in this matter. Accordingly, there is no basis for this Court to review this case simply to clarify any perceived conflict in the Fifth Circuit's jurisprudential interpretations of Rule 4(k)(2).

II. THE DECISION OF THE FIFTH CIRCUIT IS NOT IN CONFLICT WITH ANY DECISION FROM THIS COURT

In order to obtain review by the Court, UMS relies heavily upon this Court's decision in *Omni Capital*

International v. Rudolph Wolff & Co., 484 U.S. 97, 108 S.Ct. 404, 98 L. Ed.2d 415 (1987). In particular, UMS argues that the decision of the Fifth Circuit fails to conform with the *Omni Capital* decision which is controlling as to the jurisdiction over a foreign defendant who is not subject to Rule 4(k)(2). However, UMS fails to recognize a critical distinction between this case and *Omni Capital*. The holding in *Omni Capital* was grounded upon the fact that service of process upon the defendant was made in accordance with the Louisiana Long-Arm Statute. *Omni Capital International v. Rudolph Wolff & Co.*, 484 U.S. 97, 108, 108 S.Ct. 404, 411 (1987). Since certain defendants in *Omni Capital* were not amenable to service of process under the Louisiana Long-Arm Statute, this Court held that the District Court could not exercise personal jurisdiction over those specific defendants.

In arguing for a jurisdictional analysis based solely upon the contacts of UMS with the forum state, UMS fails to recognize that service of process was not made upon it pursuant to the Louisiana Long-Arm Statute. Instead, service of process was made in accordance with the procedure set forth in the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. Accordingly, *Omni Capital* is inapplicable to this matter because service of process was not effected under state law. As a consequence, the Fifth Circuit was not prohibited by *Omni Capital* from permitting the exercise of personal jurisdiction over UMS in accordance with the totality of its contacts with the United States.

UMS further argues that the Fifth Circuit's decision fails to properly apply Rule 4(k)(2) in light of this Court's decision in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955). UMS

essentially asserts that *Wilburn Boat* requires that all marine insurance issues are to be resolved by state law and that this automatically precludes application of Federal Rule of Civil Procedure 4(k)(2) to foreign marine insurers. However, UMS glosses over the complex interplay between federal and state law in resolving marine insurance disputes in order to invite unnecessary review of the Fifth Circuit's decision.

It is axiomatic that marine insurance disputes are to be determined by federal maritime law and not by simple application of state law. *Aasma v. American Steamship Owners Mutual Protections and Indemnity Association, Inc.*, 95 F.3d 400, 403 (6th Cir. 1996). *Wilburn Boat* only allows for admiralty courts to apply state law in maritime cases in certain situations.

The decision of the Fifth Circuit is therefore entirely consistent with *Wilburn Boat*. State law does not oust or displace maritime law through *Wilburn Boat*. Instead, state law is applied as federal maritime law whether characterized as "borrowing", *Continental Casualty Company v. Anderson Excavating & Wrecking Company*, 189 F.3d 512, 519 (7th Cir. 1999), or as a result of the simple application of maritime choice of law principles. *Aasma v. American Steamship Owners Mutual Protections and Indemnity Association, Inc.*, 95 F.3d at 403; *Windsor Mount Joy Mutual Insurance Co. v. Giragosian,* 57 F.3d 50, 54 (1st Cir. 1995). When viewed in this context, the Fifth Circuit's decision is entirely harmonious with *Wilburn Boat.*

Finally, it must be noted that there is nothing in the record to support the argument of UMS that the lower courts applied state law in determining its liability as a marine

insurer. Although Louisiana law was pled in the Original Complaint, the decision of the lower courts did not turn upon the application of Louisiana law in order to impose liability upon UMS. In the absence of any application of state law, there is simply no genuine conflict between the decision of the Fifth Circuit and *Wilburn Boat.*

III. THERE IS NO NEED FOR THIS COURT TO ENUNCIATE A CLEAR INTERPRETATION OF FEDERAL RULE OF CIVIL PROCEDURE 4(k)(2)

UMS asserts that review by this Court is necessary in order to eliminate any confusion regarding the application of Federal Rule of Civil Procedure 4(k)(2). However, there is no confusion in the present state of the law regarding the interpretation of Rule 4(k)(2). The decision of the Fifth Circuit in this matter allows for a clear, concise and straightforward application of Federal Rule of Civil Procedure 4(k)(2). UMS offers no reason why such an approach should be abandoned in order to allow for the possible application of state insurance law through *Wilburn Boat.*

As a preliminary matter, it must be recognized that the arguments advanced by UMS will only promote confusion instead of clarification of Federal Rule of Civil Procedure 4(k)(2). This Court has previously conceded that its decisions concerning the permissible scope of state regulation over marine matters are inconsistent. *American Dredging Company v. Miller,* 510 U.S. 443, 452, 114 S.Ct. 981, 988-89, 127 L. Ed.2d 285 (1994). Significantly, the case usually cited as an example of this inconsistency is *Wilburn Boat. Id. Wilburn Boat* has also been the subject of considerable criticism and confusion, particularly among the lower

courts. If this Court was inclined to review this case in order to clarify and define the scope of Federal Rule of Civil Procedure 4(k)(2), arguably there could be no worse framework for this analysis than that constructed by the *Wilburn Boat* decision.

Significantly, UMS does not seek reexamination and clarification of *Wilburn Boat* by this Court. Instead, UMS seeks to incorporate this confusion into Rule 4 (k)(2) solely in order to thwart the exercise of personal jurisdiction over a foreign marine insurer. This effort is entirely unwarranted as the Court of Appeals' decision allows for a more precise application of Rule 4(k)(2) to all maritime defendants. Therefore, UMS simply fails to identify any discernible benefit that would result from review of this case by this Court.

CONCLUSION

In the absence of any real conflict between the decision of the United States Court of Appeals for the Fifth Circuit and any decision from this Court or from any other Circuit Court of Appeals, consideration of this matter by the Court is wholly unnecessary. UMS only seeks to foster unnecessary confusion in order to create a foreign marine insurance exception to Federal Rule of Civil Procedure 4(k)(2) based solely upon the *Wilburn Boat* decision. Such an exception is particularly inappropriate and would only benefit foreign marine insurers seeking to evade the jurisdiction of federal courts exercising their constitutional grant of admiralty jurisdiction. For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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